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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 243

ALTHEA I. CUNNINGHAM,
Petitioner,

vs.

CITY OF CHICAGO, a Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS.

REPLY BY PETITIONER CUNNINGHAM.

GEORGE A. MASON,
GEORGE A. MASON, JR.,
WEIGHTSTILL WOODS,
69 W. Washington Street,
Chicago 2, Illinois.
Attorneys for Petitioner.

GEORGE A. MASON,
GEORGE A. MASON, JR.,
WEIGHTSTILL WOODS,
Of Counsel.

BARNARD & MILLER, 33 S. Market St., Chicago 6. FRanklin 2-0562

INDEX SUMMARY FOR CUNNINGHAM REPLY.

The brief for City of Chicago in opposition to Cunningham petition for writ of certiorari, does not contest nor oppose any citation nor any statement made by Cunningham petition. All that Mrs. Cunningham has set forth by her petition stands admitted on this record by the City of Chicago. The brief in opposition for the City of Chicago proceeds upon new matter by way of confession and avoidance. We dispose of that as follows:

I.

The petition fully shows that a federal question was raised and lies exposed upon this record in the same manner that like question arose in the *Missouri* cases which petitioner has cited. In the *Missouri* cases this Supreme Court took jurisdiction and reversed the Missouri courts.

The Cunningham petition does not contend that the construction of a statute will raise a constitutional issue for review in this court. Counsel for the City of Chicago should not say that. The Cunningham petition shows that the case at bar is not within nor subject to the rule that an appeal to an Appellate Court may be a waiver of some constitutional questions. We discuss that rule fully in this reply.

Petitioner denies that there is any identity of pleading or subject matter between this case and the *Trust Company of Chicago* case. There are basic differences in pleading and theory and facts.

II.

Petitioner does not contend that this court will review any judgment of a state court merely because it is erroneous. The petition urges that this Supreme Court has

reviewed and will review a failure by a state court to give a fair hearing of the matter well pleaded. Petitioner has set forth your decisions to establish that very fact of your constant exercise of jurisdiction.

There is no issue here about guarantee of correct judgments. Counsel for the City of Chicago should not say that.

This case is substantially different from the *Trust Company of Chicago* case, whether we examine pleading, theory or fact.

Petitioner has not had full and fair hearing, nor any hearing whatever upon her pleading in chancery. That hearing has been refused in the same manner that hearing was denied by state courts in the *Missouri* cases which are discussed by our petition. A fair hearing has been denied and refused at bar by the Illinois courts, upon the case set forth by pleading in chancery, asserting an historic right over which the court of chancery has exclusive jurisdiction.

III.

It is not true, as opposing counsel say, that the claim of petitioner is solely for interest under an interest statute. The Cunningham petition clearly demands interest accruing on a land condemnation judgment as part of just compensation and upon the security of a constitutional lien, which is confirmed by the Illinois and Federal Supreme decisions that are cited and discussed by the Cunningham petition.

For like reasons, the pleading by Cunningham is not for a simple situation of claim for interest upon a judgment of mine run quality. The Cunningham pleading seeks recovery for part of just compensation, accruing as part of a judgment of condemnation that is secured by a constitutional lien, and confirmed by Supreme Court of Illinois recent decisions.

Petitioner has not waived any rights at all. Mrs. Cunningham has pressed promptly and energetically all remedies which are open under the usual practice in the courts of Illinois. .....Petition and reply.

The *Cohen* case arose as a suit at law with entirely law pleading and statement of facts. *Commissioner* v. *Sunnen*, 333 U. S. 591, 601. .....Pages 10-11

CUNNINGHAM AFFIRMATIVE REPLY.

A. The Edwardsville decision, 269 U. S. 190, has no resemblance to the present record, and is not applicable to the case presented by Mrs. Cunningham as petitioner before this court. .....Pages 1-7

B. The *Trust Company of Chicago* case, 327 Ill. App. 222 and similar citations, are not in point but are distinguished by fact and pleading. .....Pages 7-9

C. The basic stand by petitioner upon established procedure in Illinois, upon rights under historic equity over which chancery has exclusive jurisdiction (which opposing counsel do not deny) renders inapplicable all citations made by counsel for the City of Chicago. Those citations are merely decisions at law as to legal rights within the range of pleadings at law. .....Petition and Pages 9-11

D. Each of the provisions of the constitutions upon which petitioner Cunningham relies is, and all of them are, self-executing. So that our suit and petition rely directly upon the constitutions. The self-executing nature of these provisions of the constitutions has not been urged nor considered in any of the citations mentioned by counsel for the City of Chicago. .....Pages 4-10-11

E. Petitioner Cunningham has shown a clear case for review and reversal by this Supreme Court. .....Page 12

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REPLY BY PETITIONER CUNNINGHAM.

A.

The ruling made by the *Edwardsville* case does not apply to the record at bar because:

First: The trial court in the *City of Edwardsville* case had before it and considered a stipulation of facts, and made findings and determined special rulings of law. Nothing of that sort occurred, and all of it is wholly absent from the Cunningham record. (Rec. 22, Petition 2)

Second: In the *Edwardsville* case, the Supreme Court of Illinois was fully briefed and filed two full length opinions in different years; but in the *Cunningham* case that court did not file any opinion at any time, and never took jurisdiction of the case.

Third: In equity cases in Illinois, the Supreme Court must review each case upon the facts as well as upon the law. (Civil Practice Act, § 92 (3b)). The *Edwardsville* case was a suit in debt at law, where the facts found by the Appellate Court were final. This *Cunningham* case relies upon a complaint in equity upon matter over which the court of chancery has exclusive jurisdiction. It was the bounden duty of the Supreme Court of Illinois to review and revise any error of fact committed by the Appellate Court of Illinois. The Supreme Court of Illinois refused and failed to perform its duty. That court evaded its duty by refusing to take jurisdiction and failing to reverse the ruling by the Appellate Court of Illinois, which asserted as fact what had not been determined by the Circuit Court. That Circuit Court never tried any facts at all, but refused to do so.

Fourth: In the *Edwardsville* case, counsel did not suggest nor urge and the courts did not consider, the power and duty cast upon the Appellate Court of Illinois by Section 32 of Chapter 37 Illinois Revised Statutes, which is the Courts Act of Illinois. That statute was not mentioned nor discussed in the *Edwardsville* case. (That statute is set forth as appendix to this reply, below at page 13)

By that statute as authorized by the Constitution of Illinois (Art. VI, Section 11), the Legislature of Illinois made provision in accord with Article VI, Section 2 of the Constitution of the United States (page 16 of Cunningham petition) that the Appellate Court of Illinois did have power and duty to pass upon all questions submitted to it, in relation to matters of constitutional law.

Furthermore, the City of Chicago cannot now claim a waiver, because it did not ask for transfer from Appellate Court to the Supreme Court of Illinois, as it did in the *Wanless* case, 378 Ill. 453, and in the *Seifried* case, 378 Ill.

479, and many other cases. Thereby the city accepted the Appellate Court of Illinois as the appropriate tribunal to decide the federal right and constitutional manner of questions and issues that are before the court at bar.

Since the Appellate Court by Section 32 of Chapter 37 of the Courts Act of Illinois, and by Article VI, Section 2 of the Constitution, has the *Power* to decide all questions presented by the present record, and since the city made no motion for change of venue from the Appellate Court, all question of jurisdiction was closed, as provided by Section 11 of the Civil Practice Act of Illinois. The city speaks much too late, for the first time in this Court.

Fifth: In the *Edwardsville* case, counsel did not suggest nor urge and the courts did not consider, the established principle of law, that where the constitutional question first appears by denial by the Appellate Court of constitutional federal right (which is the state of record now at bar) then there is no basis for any claim of waiver, and no such contention can be heard from opposing party or counsel.

Sixth: In the *Edwardsville* case, counsel did not suggest nor argue and the courts did not consider, that all constitutional questions properly and necessarily go to the Appellate Court of Illinois, save only when there is presented a *new debatable interpretation or construction* of some provision of the constitution of Illinois. That separation of appealable matter is thoroughly established by all authorities in Illinois.

Clarke v. *Storchak,* 384 Ill. 564; Appeal dismissed, 322 U. S. 713.

Seventh: In the *Edwardsville* case, counsel did not suggest nor argue and the courts did not consider the basic principle that some constitutional questions are self-executing. They act directly at once. They do not require nor

permit any construction nor interpretation. Any and all courts must execute them.

Each and all of the constitutional provisions on which petitioner Cunningham now relies are self-executing. The application of them to the pleadings raises only issues which properly are taken to the Appellate Court of Illinois, and would not have been received by the Supreme Court of Illinois upon direct appeal.

Eighth: The absence of jurisdiction on direct appeal to the Supreme Court of Illinois, for the kind of constitutional issues that are shown by the Cunningham petition and record now at bar, is illustrated by refusal of Supreme Court of Illinois to accept jurisdiction upon direct appeal, in the case of *Trust Company of Chicago* v. *City of Chicago*, No. 29438, where the order of transfer was entered by the court without any opinion to go with it. A similar case is *City of Chicago* v. *McCausland*, 374 Ill. 34, 308 Ill. App. 538, and 379 Ill. 602. That was a real merry-go-round in which the Supreme Court of Illinois wrote two opinions, one refusing jurisdiction on direct appeal, and a second one after the case had been through the Appellate Court. The final opinion by the Supreme Court of Illinois allowed the second appeal and reversed the Appellate Court. This *McCausland* case shows the utter futility of going first to the Supreme Court of Illinois on self-executing provisions of the constitution.

The self-executing provisions permit of mandamus relief against cities where as in Illinois *scire facias* is not permitted as remedy.

People ex rel. v. *Glencoe*, 372 Ill. 280.

Thus in *Stop* v. *Wilt*, 177 Ill. 620, the court ruled that a deed was not needed from a mortgagee who was a party to the condemnation suit, that the judgment itself operates

as a self-executing transfer of claim against the land to the fund which is the substitute for the land.

And in *City of Chicago* v. *Salinger*, 384 Ill. 515, the court ruled that where land was condemned that was covered by a mortgage, the lien of the mortgage was automatically transferred to the fund by the judgment of condemnation.

Particularly we mention the case of *People ex rel. Wanless* v. *City of Chicago*, 378 Ill. 473, where the Supreme Court of Illinois stresses the self-executing nature of the provision of the constitution for condemnation of real estate. That opinion establishes that the judgment for condemnation is only a step in the process of taking, and that the constitution follows throughout until full payment with interest has been completely made to the landowner who was dispossessed by the eminent domain proceeding. The theory upon which the city operates namely, that when once it enters the condemnation judgment, it becomes merely a judgment debtor, with the rough and ready defenses of a judgment debtor, is directly contrary to the *Wanless* decision and unworthy of the great City of Chicago. The direct application of the constitutional provision for full and complete just compensation with interest, remains a sword to the property owner until he is paid. The city admits on this record that payment of interest has not been made to Petitioner. But payment was made to Garrett.

Eighth: In the *Edwardsville* case there was discussed and considered only section 118 of the Civil Practice Act of Illinois (now section 75(1) of Civil Practice Act) which reads as follows:

> "Appeals shall be taken directly to the Supreme Court in all cases in which a franchise or freehold or the validity of a statute or a *Construction* of the constitution is involved, and in cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the public interest so requires, and in all cases relating to revenue,

or in which the State is interested as a party or otherwise." (Italics added.)

Since the *Edwardsville* case was decided, the Supreme Court of Illinois has by *ipse dixit* further limited its direct appeal jurisdiction to exclude questions which it says are not debatable because a former case in that court is *stare decisis* on such question.

Richter v. *City of Mt. Carroll*, 398 Ill. 473 at 477 (1941).

Inasmuch as the *Wanless* case, 378 Ill. 453, at 459 (Petition 43) was *stare decisis* on the interest-just compensation-constitutional question in the case at bar, many years before appeal taken herein to the Appellate Court of Illinois, petitioner was forbidden by the statute and the *ipse dixit* rule of Supreme Court of Illinois, to apply to that court by direct appeal.

For each and all of the foregoing reasons, petitioner says that the *Edwardsville* case and the *Parker* case, 333 U. S. 571, have no bearing at all upon the jurisdictional phases of the case at bar.

The many changes and self-made limitations by the Supreme Court of Illinois cutting down its own sphere of jurisdiction, as shown above, has necessarily enlarged the classes of cases that must be heard, and has expanded the range of questions and problems, that must be appealed to and decided by the Appellate Court of Illinois on direct appeal. This voluntary and repeated narrowing by the Supreme Court of Illinois of its own jurisdiction on direct appeal, has made obsolete the language of the opinion by Your Honors in the *Edwardsville* case. That obvious truth, together with the incomplete briefing of the questions before your decision of that case in 1925, as shown above, by failure to mention the Appellate Court Act Section 32

and other pertinent features of Illinois procedural law, presents substantial reason why Your Honors may wish to re-examine the whole matter of the *Edwardsville* case. If you do so, present counsel believe that you will reverse it wholly. We say this particularly because your opinion in the *Edwardsville* case, does not mention Article VI Section 2 of the Constitution of the United States, which is a primary Self-Executing provision.

The argument made by Counsel for the City of Chicago, illustrates the fact that there is confusion in Illinois on the civil side, equally as great with reference to constitutional appellate review and federal question appellate review, as was true with reference to criminal law before Your Honors gave directions in the *Marino* case. 68 S. Ct. 240 ff. As shown above by the *McCausland* case, even the Supreme Court of Illinois was confused, and later corrected its own error, after the merry-go-round came back a second time from the Appellate Court.

B.

Likewise the *Trust Company of Chicago* case is not in point, 327 Ill. App. 222.

The pleading in that case did not claim for interest, but said that in equity all payments that had been made must be credited first to interest and thereafter upon the principal of the judgment, and thereby of necessity the balance due was principal of the judgment. That pleading did not mention Section 42a of the Local Improvement Act of Illinois and made no claim under it. That pleading did not involve nor mention any double judgment proceeding where as here at bar, both the taking of land and the assessment to pay for it are within one ordinance and one court proceeding. Section 42a is by express language of the statute (section 84-42a) applicable only to the combined improve-

ment double judgment proceeding. Thereby section 42a was nowise related to any pleading issue in that case. No claim was made at any time nor in any court in that case to recover under the special trust arising under section 42a. Counsel in that case did say *in arguendo* that the existence of section 42a in the Local Improvement Act was evidence that the legislature intended that the City of Chicago was and must be a trustee of any and all funds that might be used to pay the property owner. That statement was made as matter of law and not with relation to any fact or pleading in the case of *Trust Company of Chicago.*

Directly to the contrary is the record now at bar, (Rec. 13-21, petition 6-10 and throughout). The Amended Complaint in Chancery is bottomed squarely upon section 42a and the trust arising therefrom by the wilful and voluntary acts of the City of Chicago. The briefs in all the Illinois courts and here are based thereon. The record of any case sets the circumference of matter involved in any court of record. Matters outside that are mentioned *arguendo,* may have some persuasive effect, but the judgment that is rendered cannot be broader than the specific pleading in the prior record.

The avid manner in which the City of Chicago and the opinion by the Appellate Court seize upon the mention of Section 42a *arguendo* by counsel in another lawsuit, shows a complete failure to separate the court of record from a court of conversation. To step outside the pleading and seize upon such slight circumstance of argument, shows a desire to win by slurring unlike matters to create confusion. The same remarks were made by the opinion in the *Boal* v. *City of Chicago* case, (330 Ill. App. 614). They were not true then and are not true now, as a matter of factual pleading. The great emphasis upon a merely marginal circumstance by counsel for City of Chicago, is a clear indication that they have no defense.

The *Boal* case was abandoned because the sum claimed was too small to permit the Illinois Supreme Court to take jurisdiction on appeal. The *Trust Company of Chicago* case in this court did not assert the failure to give a fair hearing which is now urged under the *Missouri* cases. The denial of that federal right and argument to support it are absent from the petition and the briefs in *Trust Company* case.

The shallow and superficial nature of the reasoning of counsel for the City of Chicago is shown by quotations at pages 5 and 6 of their brief in opposition. They say that if two cases have the same major premise they are twins. If two cases arise in a condemnation proceeding, they say they are alike in all particulars. That manner of defense is like saying that if two men each have two hands and two feet, then they have the same identity, even though the men are of different races and live far apart geographically. In the language of the current popular song, the argument throughout by the City is "heap much smoke and no fire."

Nothing could be more absurd than the suggestion of the City that any one can change the major premise of a case in Eminent Domain. Inevitably that major premise arises directly out of the Constitutional provision that secures private property.

Therefore the present record is based upon fresh and new matter, which has not at any time so far as counsel know, been before this court.

C.

The basic stand taken by petitioner throughout her record and petition upon established procedure in Illinois, upon rights under historic equity over which in that State, chancery has exclusive jurisdiction and paramount control (Petition 36, which opposing counsel do not deny), renders

inapplicable all the citations by counsel for the City of Chicago. Those citations are merely decisions at law as to facts and legal rights arising within the range of pleadings at law. They cannot and they do not apply to pleadings in equity nor to facts and issues which are the exclusive domain of equity jurisdiction.

In the *Cohen* case 377 Ill. 221 at 236, recovery of interest was sought and obtained by a suit at law with pleadings at law, after the principal awarded by the judgment of condemnation had been paid to the dispossessed property owner, by checks, vouchers and receipts, which opposing counsel say are like those used in the activities prior to filing the case at bar. The Supreme Court of Illinois sustained that recovery of interest by that separate suit. That being true, it is difficult to see why opposing counsel seek to make so much of that case.

The *Wanless* case (378 Ill. 453) was later than any of the cases mentioned by counsel for the City of Chicago. Careful reading of opinion and record in the *Wanless* case, makes it clear that the Supreme Court of Illinois has abandoned the merely legal theories of former decisions, and by the *Wanless* case, emphasizes the constitutional basis for recovery by the property owner of interest accruing after entry of the judgment of condemnation, and continuing until payment of all accruing interest has been made to the property owner. This forthright emphasis of the constitutional right of the property owner, is not new but is a revival of the earlier decisions such as *Chicago and Eastern Illinois Railroad Company* v. *Hay,* 119 Ill. 493 at 502 and *Epling* v. *Dickson,* 170 Ill. 329 at 33 and *Mecartney* v. *City of Chicago,* 273 Ill. 276 at 281. As shown at page 36 of Cunningham Petition in this Court, in Illinois, the Court of Chancery is paramount over courts at law in trust matters. And thereby the chancery rulings we have men-

tioned, render citations by the City of Chicago of law cases, to be wholly inapplicable to this suit in equity.

> "But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with but in a form separable from, the one dealt with in the first proceeding. In the situation a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result, or if consistency in decision is considered just and desirable, reliance may be placed upon the ordinary rule of stare decisis. Before a party can involve the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding *must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment.*" (Italics supplied.)

Commissioner of Internal Revenue v. *Sunnen,* 333 U.S. 591 at 601. By her record here, Mrs. Cunningham shows an entirely new bundle of rights and principles of historic chancery as her basis for recovery.

D.

Each of the provisions of the constitutions upon which petitioner Cunningham relies, is and all of them are self-executing. They do not involve nor require any construction and are not debatable. Our suit and petition rely directly upon those provisions of the constitutions. We seek enforcement. The self-executing nature of those provisions of the constitutions has not been urged nor considered in any of the citations mentioned by the City of Chicago. As an instance of the right of petitioner, we refer again to the *Wanless* case, which is discussed above and at page 43 of petition.

E.

Petitioner Cunningham has shown a clear case for review and reversal by this Supreme Court.

As shown above at pages 1 to 7 and by the Appendix, the Appellate Court of Illinois has jurisdiction on direct appeal for all of the questions in this case that were submitted to it. Also as shown by the same matter, the Supreme Court of Illinois has refused to exercise jurisdiction on direct appeal over such questions and cases. Consequently, the brief by the city is wholly in error with reference to jurisdiction.

Also we have shown above at pages 7 to 11, that there has not been presented to this court any record like the present for seeking relief which we ask by our petition.

It follows that the petition should be granted, that the writ of certiorari should be issued and that this court should review and determine this case.

Respectfully submitted,

ALTHEA I. CUNNINGHAM,
Petitioner,
By GEORGE A. MASON,
GEORGE A. MASON, JR.,
WEIGHTSTILL WOODS,
Her Attorneys.

GEORGE A. MASON,
GEORGE A. MASON, JR.,
WEIGHTSTILL WOODS,
Attorneys for Petitioner.

APPENDIX.

ILLINOIS REVISED STATUTES—1947.
Ch. 37—Courts—Sec. 32.
p. 1123.

32. JURISDICTION-APPEALS, ETC. Sec. 8. The said appellate courts created by this Act shall exercise appellate jurisdiction only, and have jurisdiction of all matters of appeal or writs of error from the final judgments, orders or decrees of any of the circuit courts, or the Superior Court of Cook County, or county courts, or from the city courts in any suit or proceeding at law, or in chancery other than criminal cases, not misdemeanors, and cases involving a franchise or freehold or the validity of a statute and from final judgments or orders of any Court entered in proceedings for adoption. Appeals and writs of error shall lie from the final orders, judgments or decrees of the circuit and city courts, and from the Superior Court of Cook County, directly to the Supreme Court, in all criminal cases and in cases involving a franchise or freehold or the validity of a statute.

In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal

or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court: Provided, however, that in actions *ex contractu* (exclusive of actions involving a penalty) and in all cases sounding in damages the judgment, exclusive of costs, shall be more than fifteen hundred dollars ($1,500.00), or in cases in which the judgment is against the plaintiff and there is issued by the Appellate Court, or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1,500.00). As amended by act approved June 6, 1945. L. 1945, p. 649, act approved July 25, 1945. L. 1945, p. 648.